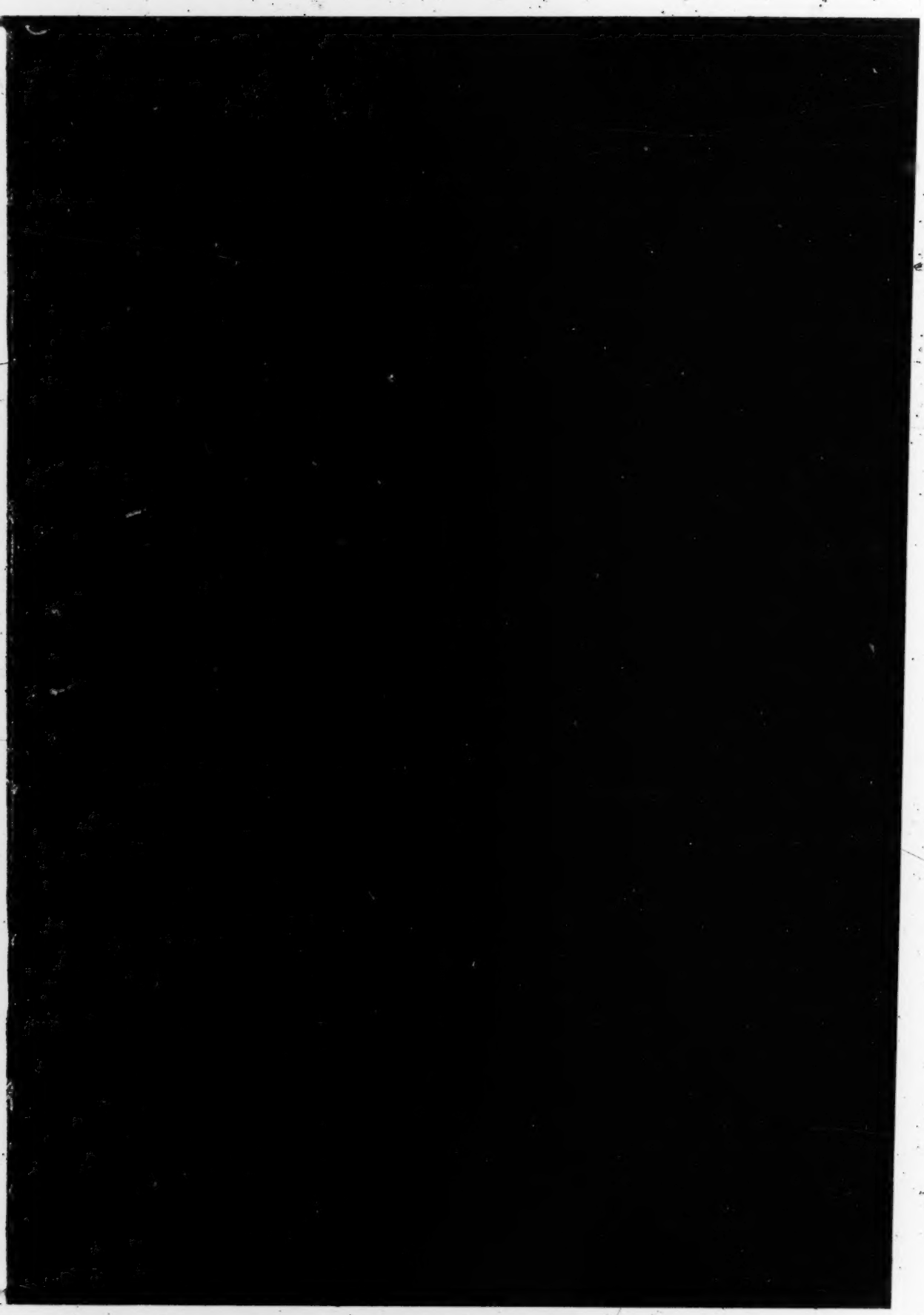

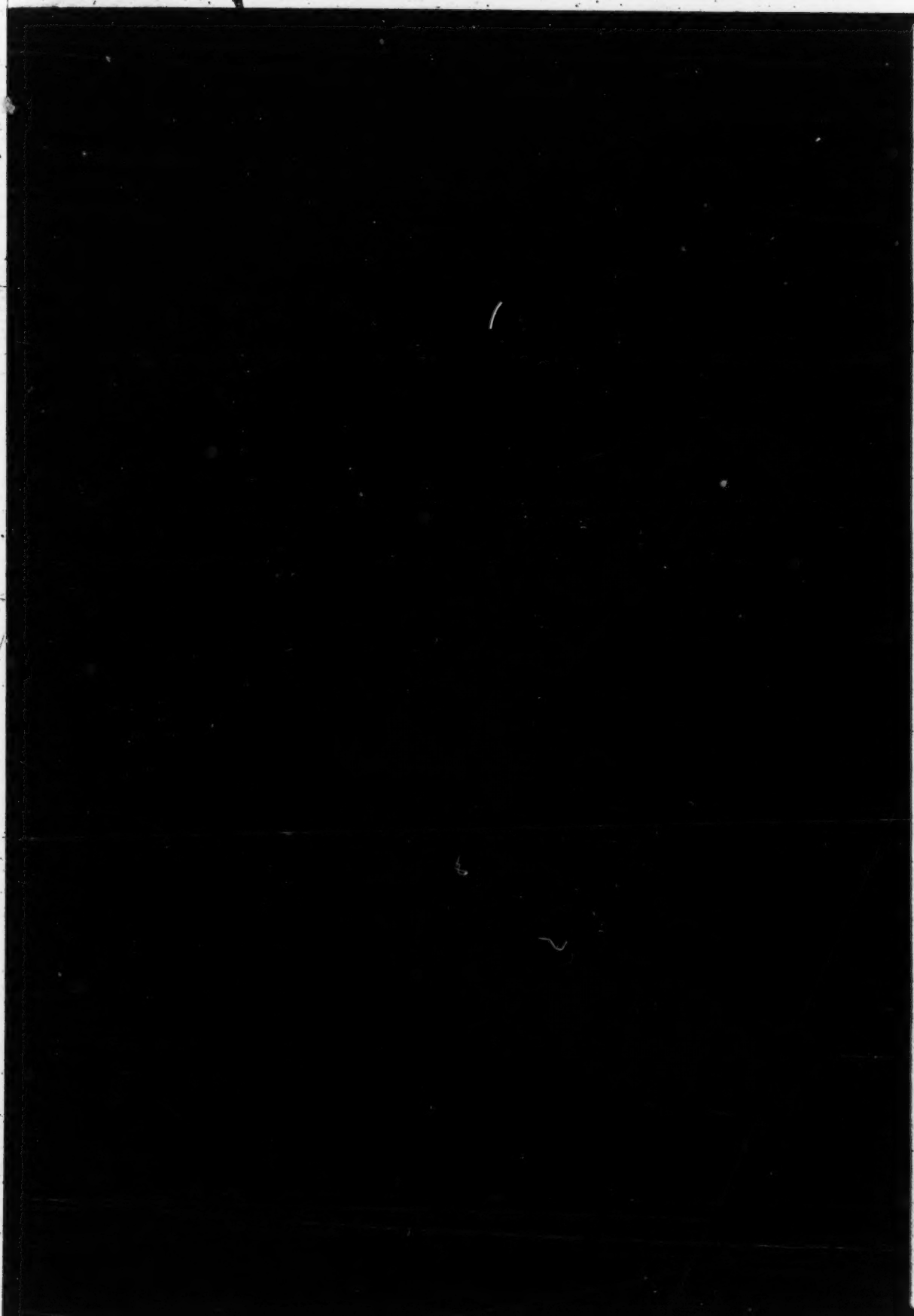

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 619

In the Matter of the Application of

DOLOMITE PRODUCTS COMPANY, INC., *Appellant*,

v.

FRANK F. KIPERS & ORS., constituting the Town Board of the Town of Gates, New York, *Appellee*.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS (AND/OR AFFIRM)

Appellee, pursuant to Rule 16 respectfully moves that the decision of the Court of Appeals of the State of New York be affirmed, on the ground that the question is so unsubstantial as not to warrant further argu-

ment, and moves that the appeal be dismissed for lack of jurisdiction under 28 U.S.C. § 1257(2).

OPINIONS BELOW

The opinion of the court of original jurisdiction, the Supreme Court of New York, Special Term, held for the Appellant (42 Misc. 2d 11, 247 N.Y.S. 2d 396 (1964)) and is set forth at pp. 2-12 of the certified Record on Appeal. The *per curiam* Opinion of the Appellate Division holding for the Appellee, reversing the lower court (23 App. Div. 2d 339, 260 N.Y.S. 2d 918 (1965)) is set forth at pp. 228-237 of the certified Record on Appeal. On Appeal the Court of Appeals affirmed the opinion of the Appellate Division in favor of the Appellee. (19 N.Y. 2d 739, 279 N.Y.S. 2d 192 (1967)).

JURISDICTION

The jurisdictional requisites as set forth in the Jurisdictional Statement of Appellant are insufficient for purposes of review of this case on appeal. This contention is argued in detail in Appellee's argument.

QUESTIONS PRESENTED

1. May Appellee invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2)?

2. Does a substantial question of Federal law exist?

STATUTES AND ORDINANCES INVOLVED

28 United States Code, section 1257 (2) and three local ordinances. The Zoning Ordinance of the Town of Gates (1948) (R. 59), the Excavations Ordinance of the Town of Gates (1950) (R. 23) and the Zone Ordinance of the Town of Gates (1963) (R. 43) are involved.

STATEMENT OF THE CASE

1. Background

This case concerns a local zoning action taken by the Town Board of the Town of Gates (Pop. 22,000) involving three community zoning ordinances affecting property within its jurisdiction (15 sq. miles).

Appellant owns 85 acres of land within the Town of Gates in the County of Monroe. The property fronts on the south side of Buffalo Road for approximately Twenty Six Hundred feet (2,600′) and extends to the south approximately Eighteen Hundred and Fifty feet (1,850′) (R. 36). This entire area amounting to Eighty Five (85) acres was purchased in 1925 (R. 101).

Appellant commenced quarrying a parcel of this land amounting to Fifty (50) acres in 1929 or 1930 (R. 111). This parcel referred to in the courts below as Parcel A lies between Buffalo Road on the north and the New York Central Railroad track on the south (R. 36, 111). The land south of the railroad track has never been quarried. The Thirty Five (35) acres south of the railroad were classified under two different zoning classifications under the 1948 Ordinance. The southern most One Hundred Seventy Five feet (175′) referred to as Parcel C was zoned "Residential." The parcel lying between the railroad tract and the southern-most 175 feet referred to as Parcel B was zoned "Industrial."

For a period of forty years from the time of purchase, and subsequent to the 1948 Zoning Ordinance, continuing until 1962, Parcel, B and C were never quarried. On January 2, 1962, Appellee hired a municipal planning firm to conduct a study and make recommendations for future land use and development

of the Town of Gates. (R. 40, 55, 57, 58). As a result of this study, a new zoning ordinance was enacted by the Gates Town Board on January 25, 1963. Under this ordinance Parcel B was zoned "Manufacturing" (R. 44), and Parcel C was zoned "Residential" and considered a buffer zone. It is undisputed that blasting and quarrying are not permitted uses for these parcels under the Ordinance (R. 43-44).

This litigation began when Appellant commenced stripping top soil from Parcel B in December, 1962. An excavation permit was not obtained by Appellant as required by the Gates Excavation Ordinance of 1950 and, therefore, Appellee issued a stop work order on December 28, 1962 (R. 35, 46-47). On January 25, 1963, Appellant applied to Appellee for an excavation permit for Parcels B and C (R. 16). Appellee denied the applications on February 1, 1963 (R. 48-49).

2. Legal Proceedings

Following denial of Appellant's applications for excavation permits, Appellant commenced a proceeding to compel issuance of the permits. The Order of the Special Term of August 5, 1963, as to Parcel B, remitted the application to the Town Board for a statement of reasons for its denial (R. 91, 83), and as to Parcel C, it directed a hearing to examine the theory of Appellant pertaining to a non-conforming use.

Prior to the submission of the Town Board statement of reasons for denial to Special Term, the Parcel C hearing was held and an order entered thereon on October 7, 1963, and it is from that order that this appeal lies (R. 2). The decision underlying the order purports to dispose of all questions relating to both Parcels B and C without reference to the remitter of the Parcel B question to the Town Board.

The order announced that both Parcels B and C were pre-existing non-conforming uses exempt from the 1948 Zoning Ordinance. The order was silent regarding the enactment of the 1963 Zoning Ordinance prior to the denial of Appellant's applications. Because the order was a final determination and directed that the excavation permits be issued (R. 6) an appeal was taken to the Appellate Division by the Town of Gates.

The Appellate Division reversed the opinion of Special Term stating that the Special Term's conclusion that Parcels B and C were in the posture of non-conforming uses was contrary to the weight of the evidence. It stated that: "It is clear from the record that no quarrying operations have been carried on in Parcels B and C since the acquisition of these properties 40 years ago." (R. 231).

Further, the Court felt that in weighing Appellant's economic interests against the Town's progressive and contemporary planning, denial of the permits was justified. (R. 232).

Appellant thereupon appealed to the Court of Appeals which affirmed the Order of the Appellate Division. The highest Court of the State of New York stated:

> "... the record makes it clear that the appellant carried on no quarrying operations on Parcels B and C since it acquired those properties more than 40 years ago. And contrary to the intimations in the dissenting opinion, the appellant, as the Appellate Division pointed out, offered no proof either (1) "as to the financial loss it may suffer" (23 A.D.2d, at p. 342); (2) or "as to the value of the land in Parcels B and C which ... are appar-

ently good residential building lots of substantial value which can be realized by (appellant) if its operations are limited to Parcel A (23 A.D.2d, at p. 342); or even (3) that "the parcels in question are more valuable for quarrying than they are for sale as residential lots" (23 A.D.2d, at p. 343)."

After losing two appeals in the New York State Courts, Appellant now seeks a further review by the Supreme Court of the United States to reverse the adverse decisions before these state appellate tribunals on the basis that a substantial question of Federal law exists. Appellee maintains that there are no compelling reasons for further review of this case, and that no substantial question of Federal law exists. In fact Appellee maintains that Appellant may not invoke the appellate jurisdiction of this Court under 28 U.S.C. § 1257(2). For these reasons the decision of the New York Court of Appeals should be affirmed and the appeal dismissed.

ARGUMENT

1. Appellant May Not Invoke the Jurisdiction of This Court Under 28 U.S.C. § 1257(2) for Review by Appeal

Appellant seeks review by appeal under 28 U.S.C. § 1257(2). To come within this section Appellant must have made specific and *plain* in the state court the contention that the application of the ordinances *to his particular circumstances* would make the ordinances *void* under Federal law. If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the municipal ordinance *to him*, an adverse decision amounts to denial of his assertion of federal rights rather than a validation

of the ordinance and review can be had in the Supreme Court *only* via certiorari pursuant to 28 U.S.C. § 1257 (3). *Mergenthaler Linotype Co.* v. *Davis,* 251 U.S. 256, 259 (1920); Stern, Supreme Court Practice, at 67 (3d ed. 1962).

Appellee submits that Appellant may not claim jurisdiction of this Court under 28 U.S.C. § 1257(2). Appellant in his brief before the New York Court of Appeals states:

> "In the case at bar, *we are not questioning the validity* of the zoning ordinance, but merely the affect of such ordinance upon the continued operation of *respondent's business.*" (Italics added). (p. 11).

And again:

> "It should also be pointed out that, in the case at bar, *Appellant is not questioning the validity* of the Zoning Ordinance of the Town of Gates. . . ." (Italics added). (p. 12).

The validity of a state statute or local ordinance is sustained for the purpose of an appeal under 28 U.S.C. § 1257(2) where the state court holds the statute or ordinance to be constitutional and consistent with the Constitution, treaties, or laws of the United States. In a notice of motion to amend Remittitur the Appellant moved the New York Court of Appeals to certify that Appellant on appeal raised questions under the Constitution of the United States and that the New York Court of Appeals necessarily passed upon them.

The order of the Court of Appeals issued in response said:

> "Petitioner contended that the police power of the municipality (Town of Gates) has been unconsti-

tutionally exercised against *it* and that its property has been unconstitutionally taken, without just compensation, in violation of the Fifth Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment. The Court of Appeals held that *there was no constitutional impairment of any property right of the petitioner.*" (Italics added). (Appendix, Exhibit 7, p. 69, Appellant's Jurisdictional Statement.)

The Court of Appeals refused to hold the Ordinance repugnant to the United States Constitution, or to pass upon the validity of the Ordinance.

The record including the motion to amend the Remittitur and the subsequent order of the Court of Appeals is quite clear. In the courts below Appellant did not advance a clear and unambiguous contention that the Ordinance was *void.* The validity of the Ordinance was never questioned. Indeed, the highest court of the State of New York recognized that Appellant claimed a *personal* impairment of a property right and it rejected that claim.

Nowhere in the original memorandum opinion or in the amendment does the Court of Appeals ever discuss the validity of this ordinance. The Court of Appeals was aware that Appellant had never contested the validity of the local ordinance; and because Appellant did not contest the validity of the ordinance below it can not now seek review by appeal under 28 U.S.C. § 1257(2). *Charlestown Federal Savings & Loan Assn.* v. *Alderson,* 324 U.S. 182, 185-188 (1944). Appellant moves for the dismissal of the appeal on the ground that the jurisdiction of this Court may not be invoked under 28 U.S.C. § 1257(2).

2. No Substantial Questions of Federal Law Exist

(A) *There are no valid reasons for further review of this case.* The issue in the lower courts involved a simple and uniquely narrow local zoning matter: did Appellant have a non-conforming use as to Parcels B and C (areas south of the railroad tracks) notwithstanding the ordinance enacted by the Town of Gates on January 23, 1963. Appellant never quarried the land south of the railroad tracks in the forty years that it owned it, nor was a permit sought during almost all of that period. Moreover, under the 1948 ordinance, a permit to quarry was never obtained during a fifteen year period ending with the ordinance changes of 1963.

During the forty year period the only activity within the area was preparation for use which did not begin until 1949, and included only the stripping of top soil from a limited area in 1949, and some test drilling and construction of a berm in 1962. Preparation for use does not constitute use.

Appellant cites numerous cases supporting his position, such as *McCaslin* v. *City of Monterey Park*, 163 Cal. App.2d, 339, 329 P.2d 522 (1958). *McCaslin* was an action to enjoin enforcement of zoning ordinances designed to compel discontinuance of plaintiff's property as a quarry. The issue was the validity of the provisions of the zoning ordinance as applied to plaintiff's operations. But in that case the Court reacted in exactly the same manner as the New York Courts in the instant case, to wit:

> "Of course, plaintiff's nonconforming use of the property in question can not be expanded or extended to a separate parcel called Parcel 2 in the record or to the 200-foot buffer area along the west-

> erly end of the property in question adjacent to the residential area. To this extent the ordinance prohibiting the expansion or extension of nonconforming use to 'the same or adjoining property' is applicable to Plaintiff." (163 Cal. App. 28 339 at 350).

Appellant further cites as authority supporting his case, *Town of Billerica* v. *Quinn,* 320 Mass. 687, 71 N.E.2d 239 (1947), and *Borough of Cheswick* v. *Bechman,* 352 Pa. 79, 42 A.2d 60 (1945). The cases are similar. In the former case the town sought to enjoin defendant from stripping loam from a tract in violation of the town zoning by-law. The Court stated:

> "It is plain that the Legislature intended that existing uses should be preserved. It is equally plain that under the statute and the by-law they are not to be extended." (320 Mass. 687 at 688).

And again:

> "The mere intention to strip the remainder of the land does not amount to an existing use of it." (320 Mass. 687 at 690).

The Court stated that the mere stripping for the purpose of sale of loam from a comparatively small area of land before the land became subject to the law did not establish stripping as an existing use of the entire tract.

Appellant cites numerous New York cases which were, of course, fully considered by the New York Courts when they decided against the Appellant. At that time the Appellate Division stated:

> "It would be patently unfair to the homeowners who have built residences in the area to hold that the intention to quarry, not carried out for over

a 40-year period, is sufficient reason to enable respondent to tack on the non-conforming use of Parcel A to Parcels B and C. The test of the character of Parcels B and C should be the use made of these parcels prior to the adoption of the zoning ordinance which now makes quarrying illegal without permit. It is not consonant with progressive and contemporary planning to permit one to purchase a large parcel of real property, work thirty-five acres of it and do nothing for 40 years with the balance of forty-seven acres but, nevertheless, have the right some time in the distant future to make a non-conforming use of it in violation of an ordinance prohibiting it and to the great detriment of the adjacent homeowners. Such a philosophy of planning could stunt or kill the growth of the substantial area of properties surrounding the parcels in question, for abutting owners would be required to wait, as in the instant case, for decades to determine the use which could be made of the property." (23 App. Div.2d 343). (R. 232).

(B) *The decisions below are clearly correct.* The great bulk of the Appellant's appeal is directed to arguments that the decisions below were incorrect. Appellant would invoke the jurisdiction of this Court simply to re-argue one more time the findings below. Of particular concern to the Appellant is the dollar value of the taking.

The Court of Appeals fully contemplated this issue and concluded that:

". . . the appellant . . . offered no proof either (1) as to the financial loss it may suffer . . . (2) or as to the value of the land in parcels B and C which . . . are apparently good residential building lots of substantial value which can be realized by (appellant) if its operations are limited to

> parcel A . . . or even (3) that the parcels in question are more valuable for quarrying than they are for sale as residential lots." (23 App. Div.2d 342-343).

There are no reasons for this Court to undertake a re-evaluation of the dollar argument or any of the other points of local zoning litigated below. Appellant's arguments are evidentiary and factual and the Court does not "grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, (1949) the Court restated its position:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (336 U.S. 271 at 275).

Appellant's choice of legal precedent exemplifies the strictly factual nature of this question. Appellant asks this Court for another review and cites in support of his argument of substantiality, *Ex Parte Kelso,* 147 Cal. 609, 82 P. 241 (1905). *Kelso* can be easily distinguished from the instant case because the former concerns the *maintenance* and *operation* of a quarry in connection with existing zoning and the prohibition of that existing use by subsequent re-zoning. In the instant case there was no conformity to existing zoning, no maintenance, no operation. In fact, the only similarity is the quarrying itself.

The Court stated further:

> "Whether or not a certain limitation or regulation is essential is largely a question for the leg-

> islative department, to be determined with reference to all the *existing circumstances*, and the courts will not ordinarily interfere where it can be seen that the regulation has some proper relation to an object within the domain of the public power of the state, which . . . includes all regulations having reference to 'the comfort, safety or welfare of society.'" (Italics added), (147 Cal. 609 at 612).

Appellee submits that the existing circumstances in *Kelso* are completely dis-similar and have no relevance to the instant case.

Clearly, the narrow and limited issues in this case do not present a substantial question of law. In *Zucht* v. *King*, 260 U.S. 174 (1922) the Court dismissed Appellee's claim stating:

> "Although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not . . . substantial in nature." (260 U.S. 174 at 176).

Appellee contends that in the instant case Appellant has no substantial grounds of Federal law to present to this Court, but even beyond that, the validity of the law was never formerly drawn in question which renders insufficient Appellant's request for review under the appeal jurisdiction of this Court.

CONCLUSION

Appellee in the above entitled case moves this Court to dismiss (and/or affirm) on the grounds (1) that Appellant has misconstrued his jurisdictional remedy and that this Court should consequently dismiss his appeal for lack of jurisdiction, and further (2) that

the questions presented are so insubstantial as not to need further argument and that this Court should consequently affirm the decision of the Court of Appeals of the State of New York holding for Appellee.

Respectfully submitted,

MICHAEL A. TELESCA

Lamb, Webster, Walz, Telesca & Donovan
714 Union Trust Building
Rochester, New York 14614
Telephone: 325-2150

Of Counsel

WILLIAM R. DURLAND
GEORGE C. PENDLETON

Culbertson, Pendleton & Pendleton
1155 Fifteenth Street, N.W.
Washington, D. C. 20005
Telephone: 296-3800

Attorneys for Appellee